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No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD, PETITIONER

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Jefferson County's race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether Jefferson County's race-based student assignment plan violates the Equal Protection Clause of the Constitution. The Department of Justice has significant responsibilities for enforcing the Equal Protection Clause in the context of public education, see 42 U.S.C. 2000c-6, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* The Department of Education has responsibility for enforcing federal civil rights laws affecting educational institutions, including Title VI.

STATEMENT

1. In 1973, a federal court found that the Jefferson County Public Schools (JCPS) had engaged in *de jure* segregation in violation of the Fourteenth Amendment and ordered JCPS to

desegregate. *Newburg Area Council, Inc.* v. *Board of Educ. of Jefferson County*, 489 F.2d 925 (6th Cir.). A desegregation decree was entered in 1975 that established a race-based student assignment plan and imposed countywide busing. Pet. App. C14-C15; *Hampton* v. *Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 762-765 (W.D. Ky. 1999). JCPS operated under the 1975 decree until 2000, when the district court found that JCPS had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved unitary status. *Hampton* v. *Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000). The 1975 decree was thus dissolved in 2000. Pet. App. C15-C16.[1]

In 2001, after the 1975 decree had been dissolved, JCPS adopted a voluntary race-based student assignment plan. Pet. App. C17. The plan categorizes all students as either "black" or "other," and incorporates racial guidelines that require "each school to seek a Black student enrollment of at least 15% and no more than 50%." *Id.* at C11 n.6, C17-C18. JCPS based this numerical range on the overall racial demographics of public school students in Jefferson County. Of all students enrolled in JCPS, approximately 34% are black and 66% are "other." Stip. of Facts para. 36. The plan's set racial range for black students was designed to be "equally above and below Black student enrollment systemwide." Pet. App. C18.[2]

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[1] The United States, as amicus curiae, filed a Post-Hearing Memorandum Regarding Plaintiffs' Motion for Unitary Status in the *Hampton* case. The Memorandum urged the district court to deny the motion for unitary status, pointing in particular to evidence of racial disparities in an advance program and the assignment of administrators and para-professional staff in the district. However, the Memorandum did "not address * * * the constitutionality of using race as a factor in student assignments in a post-unitary district." U.S. Post-Hrg. Mem. at 2 n.2.

[2] The district court further explained that although JCPS's racial guidelines recognize only two races—"black" and "other"—"JCPS is a school district almost entirely populated by only Black and White students," and "[s]tudents of other races and backgrounds, such as Latino and Asian students, are represented only in very small numbers." Pet. App. C11-C12 n.6.

Use of the racial guidelines occurs primarily at the elementary school level and in admissions to specialized programs (such as magnet schools and optional programs within non-magnet schools, neither of which are at issue in this case), but the guidelines also apply to transfer requests between schools. At the elementary school level, JCPS has established a series of attendance zones, determined by a student's residence, which are referred to as "resides areas." Pet. App. C18-C20. Each resides area contains a non-magnet elementary school that is designated as the "resides school" for students living in that area. JCPS combines several of these "resides areas" into clusters and provides students with a limited opportunity to choose among schools in their assigned cluster.[3] *Id.* at C18-C20, C24. The elementary schools are clustered "so that combined attendance zones, assuming normal voluntary choice, will produce at each school student populations somewhere within the racial guidelines." *Id.* at C19. Each non-magnet middle and high school corresponds to its own resides area. *Ibid.*

In general, "[a] student is assigned to his or her resides school unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines," Pet. App. C24, or unless the student applies to and is accepted to a specialized school or program. After the initial assignment process, a student may request a transfer to any non-magnet school in the district.[4] Whether a given transfer is ultimately granted depends on the racial guidelines. *Id.* at C22-C25 & n.15.

JCPS considers the racial guidelines, in addition to specific academic criteria and school capacity, in granting students' applications to magnet and other specialized programs. Pet. App.

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[3] An elementary school student may select a first and second choice school within his or her cluster, as well as a first and second choice specialized school or program in or out of his or her cluster. Pet. App. C20-C21, C24.

[4] High school freshmen have the additional option of applying for "open enrollment." If their request is granted, their receiving school becomes their "resides school." Pet. App. C22-C23.

C26-C27. That is, students will be denied admission to a magnet or specialized program if their race would place the school outside of the 15% to 50% black student enrollment required under the racial guidelines. See *id.* at C17-C18.

2. a. A group of parents—including petitioner—whose children were either not assigned to, or denied a transfer into, their schools of choice, challenged the legality of the plan under the Equal Protection Clause of the Fourteenth Amendment. After a five-day hearing, the district court rejected that claim. The court held that, with one exception not relevant here,[5] JCPS's race-based assignment plan served a compelling state interest and was narrowly tailored to achieve that interest. Pet. App. C3-C9.

b. The district court found that JCPS's interests in "giv[ing] all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system," Pet. App. C37 n.29, are compelling. The court reasoned that JCPS's asserted interests "overlap with those" approved in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and that JCPS "has articulated broader concerns in the different context of public elementary and secondary education." Pet. App. C37. The district court also concluded that other benefits identified by JCPS, such as improved educational settings for all students and the creation of a unified school system, indicate that JCPS's student assignment plan "is both important and valid." *Id.* at C50-C51.

c. The district court also concluded that JCPS's assignment plan was narrowly tailored (except for traditional schools, which are not at issue here, see p. 4 n.5, *supra*). See Pet. App. C54-C70.

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[5] The district court found that, with respect to student assignments at traditional schools, the plan was not narrowly tailored because it put black and nonblack students on different assignment tracks, and because its use of four separate lists—one each for black males, black females, nonblack males and nonblack females—"appears to be completely unnecessary to accomplish the Board's goal." See Pet. App. C32, C70-C76. That portion of the district court's decision is not at issue here.

The court reasoned that the plan, "for the most part," lacked attributes of a racial quota, because it presented a "flexible and broad target range" of black student enrollment. *Id.* at C57. Citing "a wide dispersal among the [target] percentages of Black students" in JCPS schools, *id.* at C58, the court distinguished the facts here from the narrow band of percentages Justice Kennedy found to be tantamount to quotas in *Grutter*. *Ibid.* The court also reasoned that this fluctuation in percentages suggests the plan does not have a specific target of black student enrollment, and suggests a "lesser use of race" than that found permissible in *Grutter*. *Id.* at C59. The court further found that neither black nor nonblack students are guaranteed assignment to a particular school, and that neither category of applicants is isolated from competition with the other. *Id.* at C59-C60.

The district court next found that the plan provides "individualized attention of a different kind in a different context" than this Court embraced in *Grutter*. Pet. App. C63. The court reasoned that, unlike a law school, JCPS does not deny admission to any student, does not aim to create selective, elite school communities, and does not weigh "comparative criteria in a competitive manner." *Id.* at C62. However, the court concluded that the individualized attention that the plan does provide—consideration of a student's race along with place of residence, choice of school or program, and, in some cases, placement in a lottery—is sufficient. *Id.* at C60-C63.

The district court also found that the plan's use of race does not unduly harm members of any racial group, reasoning that schools within the district are "basically equal," and that the plan "neither denies anyone a benefit nor imposes a wrongful burden" because of his or her race. Pet. App. C66 (quoting *Hampton*, 102 F. Supp. 2d at 380). The court further concluded that JCPS considered and implemented certain race-neutral strategies to achieve its goal of integrated schools, including the use of voluntary choice and geographic boundaries, which "account for a vast proportion of all student assignments" and "create a certain degree of integration" within the schools. *Id.* at C68.

3. Petitioner Crystal Meredith—whose son was denied a transfer to a non-magnet, JCPS elementary school "because the transfer would have had an adverse effect on the compliance of [his assigned school] with the racial guidelines contained in the student assignment plan," Stip. of Facts para. 5—appealed. In a summary per curiam opinion, the court of appeals affirmed on the basis of the district court's decision. Pet. App. B1-B3.

SUMMARY OF ARGUMENT

The County's race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Court held that intentionally classifying students on the basis of race violates the Equal Protection Clause, and declared the ultimate objective in eliminating such *de jure* segregation to be "achiev[ing] a system of determining admission to the public schools on a nonracial basis." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*). More recently, the Court has repeatedly confirmed that all government classifications based on race must be subjected to strict scrutiny and, accordingly, are constitutional only if narrowly tailored to further a compelling government interest.

The County has not demonstrated any compelling interest to justify its use of race. To be sure, the government has a compelling interest in remedying the effects of past intentional discrimination. But JCPS's plan was adopted after a federal court had found that the past vestiges of *de jure* segregation had been eliminated at JCPS. Nor does the plan implicate the only other compelling interest that the Court has recognized in the public education context—the diversity interest identified in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). The JCPS plan is not designed to assemble a genuinely diverse student body and thus provides for no individualized, holistic consideration of students. Instead, the plan involves "outright racial balancing," which is "patently unconstitutional." *Grutter*, 539 U.S. at 330. Whatever the outer

boundaries of what the Equal Protection Clause permits, it clearly prohibits the kind of racial balancing at issue here and the Court therefore need go no further in deciding this case.

The JCPS plan likewise fails each of the narrow tailoring factors identified in *Grutter* and *Gratz*. First, the plan provides for nothing approaching the holistic, individualized consideration that this Court has stressed is the hallmark of a constitutionally permissible race-conscious admissions process. Second, the plan is indistinguishable from a quota, because it operates based on a fixed percentage of "black" and "other" students at JCPS schools. Third, the County failed seriously to consider race-neutral alternatives for eliminating or reducing minority isolation. Fourth, the plan unfairly burdens innocent third parties because it denies certain students admission to the school of their choice solely on the basis of their race. Finally, the plan has no fixed or logical end point.

School districts have an unquestioned interest in reducing minority isolation through race-neutral means. But the solution to addressing racial imbalance in communities or student bodies is not to adopt race-conscious measures. Such measures are not only at odds with *Brown*'s ultimate objective of "achiev[ing] a system of determining admission to the public schools on a nonracial basis," *Brown II*, 349 U.S. at 301, but contravene the fundamental liberties guaranteed to each citizen by the Equal Protection Clause.

ARGUMENT

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court held that state laws that intentionally segregate public school students on the basis of race violate the Equal Protection Clause. The Court described the ultimate goal in eliminating such *de jure* segregation as "achiev[ing] a system of determining admission to the public schools on a nonracial basis." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*). Since *Brown*, the federal courts have taken extraordinary measures to eradicate not only *de jure* segregation in public

schools, but any lingering effects of such segregation. The Nation has benefitted immensely from those efforts, and such efforts are ongoing in school districts that remain subject to federal court desegregation decrees. Moreover, school districts across the country—including those not subject to desegregation decrees—have undertaken a variety of race-neutral measures to promote integration of public schools.

This case, like *Parents Involved In Community Schools* v. *Seattle School District No. 1 (Seattle)*, No. 05-908, involves the use of a racial classification to achieve a pre-determined racial balance rather than to eliminate the lingering effects of any *de jure* segregation. Although JCPS was at one time subject to a finding of *de jure* segregation and a federal court desegregation decree, that decree was dissolved in 2000 after a finding of unitary status. As a result, the plan at issue was adopted after the district court found that the vestiges of prior *de jure* discrimination had been eliminated. This case is therefore just like *Seattle* in that the race-based plan at issue is purely voluntary and not designed to eliminate *de jure* segregation. For the same basic reasons discussed in the United States' amicus brief in *Seattle*, the Equal Protection Clause forbids JCPS's race-based student assignment plan, just as it forbids *de jure* segregation itself.

I. JCPS'S RACE-BASED STUDENT ASSIGNMENT PLAN MUST SATISFY STRICT JUDICIAL SCRUTINY

The central purpose of the Equal Protection Clause is to guarantee "racial neutrality in governmental decisionmaking." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995). Thus, the Clause seeks to "do away with all governmentally imposed discriminations based on race" and create "a Nation of equal citizens * * * where race is irrelevant to personal opportunity and achievement." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)); see *Grutter* v. *Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State,

can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."). In light of the vital role of education, this Court has repeatedly emphasized that the state must make educational opportunity "available to all on equal terms." *Plyer* v. *Doe*, 457 U.S. 202, 223 (1982) (quoting *Brown I*, 347 U.S. at 493); *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

The right to equal protection is "personal" and "guaranteed to the individual." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948)). Moreover, "[r]acial and ethnic distinctions of any sort are inherently suspect and * * * call for the most exacting judicial examination." *Miller*, 515 U.S. at 904 (quoting *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)). That includes so-called "'benign' racial classifications." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 226 (1995). As the Court has explained, "[m]ore than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Id.* at 226; see *Croson*, 488 U.S. at 493-495. Thus, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Johnson* v. *California*, 543 U.S. 499, 507-508 (2005). And, as such, a racial classification is constitutional only if it is narrowly tailored to further a compelling government interest. *Grutter*, 539 U.S. at 326. Because JCPS's student assignment plan is patently race-based, that plan must survive strict scrutiny review.

II. JCPS'S RACE-BASED ASSIGNMENT PLAN IS NOT BASED ON A COMPELLING GOVERNMENTAL INTEREST

A. The Government's Unquestioned Interest In Using Race-Based Measures To Eliminate The Vestiges Of Past Discrimination Is Not Implicated Here

The prototypical government interest that warrants the use of race-based measures is remedying a finding of *de jure* segregation. See *Brown II*, *supra*; *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992). This Court has approved a variety of race-based measures, including student assignment plans, to eliminate "all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); see, *e.g.*, *McDaniel* v. *Barresi*, 402 U.S. 39 (1971). The 1975 decree adopted with respect to JCPS employed such measures, and the United States supported those efforts. See p. 2 n.1, *supra*.

Like the *Seattle* case, however, this case does not implicate that unquestioned remedial interest. Although JCPS was subject to a prior finding of *de jure* segregation and a related court decree, the district court in 2000—before the adoption of JCPS's current student placement plan—dissolved that decree after finding that JCPS had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Hampton*, 102 F. Supp. 2d at 360. The County's plan therefore cannot be justified as an effort to eliminate the vestiges of past unconstitutional discrimination and, as a result, the plan at issue stands on the same legal footing as the plan at issue in the *Seattle* case. The compelling interest in remedying past discrimination does not sanction the use of race-based measures when all vestiges of such discrimination have been eradicated.

B. The *Grutter* Interest In Obtaining A Genuinely Diverse Student Body With A Critical Mass Of Minority Students Is Not Implicated Here

Three years ago, this Court recognized a second compelling interest that permits the limited consideration of race to attain a genuinely diverse student body, including a critical mass of minority students, at universities and graduate schools. See *Grutter*, 539 U.S. at 328; *Gratz* v. *Bollinger*, 539 U.S. 244, 268-269 (2003). That interest, however, is not implicated here.

1. In *Grutter* and *Gratz*, the Court upheld the goal of assembling a "broadly diverse" class as compelling because "attaining a diverse student body is at the heart of [a law school's] proper institutional mission." *Grutter*, 539 U.S. at 329 (citation omitted); *Gratz*, 539 U.S. at 268. The Court emphasized, however, that such "diversity" was much broader than simple "racial" diversity. *Grutter*, 539 U.S. at 324-325 (quoting *Bakke*, 438 U.S. at 314-315). Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 325 (quoting *Bakke*, 438 U.S. at 315). Using race in that limited manner was permissible, the Court explained, because the law school considered "a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body" (*e.g.*, foreign language fluency, extensive travel, past personal adversity, family hardship, extensive community service, employment experience, personal background, etc.). *Id.* at 338-339.

The Court emphasized that such individualized consideration of each student's "background, experiences, and characteristics" is necessary to assess a student's "individual 'potential contribution to diversity.'" *Gratz*, 539 U.S. at 274 (quoting *Bakke*, 438 U.S. at 317). Indeed, the Court held that "individualized consideration in the context of a race-conscious admission program is paramount," and the degree of individualized consideration is largely what distinguished the law school program upheld in

Grutter from the undergraduate program struck down in *Gratz*. See *Grutter*, 539 U.S. at 337; *Gratz*, 539 U.S. at 273. By considering race as just one of many factors that would contribute to a broadly diverse student body, the law school was "not simply * * * 'assur[ing] within its student body some specified percentage of a particular group merely because of its race.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 307). Such a practice, the Court observed, "would amount to outright racial balancing, which is patently unconstitutional." *Id.* at 330.

Unlike the law school in *Grutter*, JCPS does not seek a genuinely diverse student body in its elementary schools whereby "all factors that may contribute to student body diversity are meaningfully considered alongside race." *Grutter*, 539 U.S. at 337. In determining which students must be admitted to resides schools, JCPS considers race—and only race—to maintain student bodies that include pre-set percentages of black and nonblack students. No other aspect of an individual's background is considered. Indeed, the program employs a binary conception of race, classifying students only as "black" or "other." In addition, assignment decisions are based on whether a student's race will maintain the County's pre-set racial balance, not on whether a student's individual characteristics contribute to a broadly diverse student body and foster "the educational benefits that diversity is designed to produce." *Id.* at 330. JCPS's plan therefore fails to "treat[] each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318.[6]

In light of the absence of any individualized consideration under the aspects of the plan at issue here, affirming the Sixth

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[6] JCPS has stated that a limited degree of individualized consideration (*e.g.*, the consideration of personal essays) is undertaken with respect to assignments to certain magnet or other specialized schools. See Br. in Opp. 5-6. That aspect of the plan is not at issue here. In any event, the greater individualized consideration afforded in that context only underscores that individualized consideration of students may be possible in at least certain circumstances in the elementary and secondary school context. But cf. 05-908 Pet. App. 40a-41a n.24.

Circuit's decision would remove the critical requirement that individuals be considered as individuals and open the way for the wholesale consideration of race in which students are labeled solely on the basis of their race and then granted or denied admission based on that label in order to achieve a pre-set racial balance among students. Such an endorsement would provide a limitless, circular justification for race-based decisionmaking because it identifies a race-based assignment to be the goal in itself. See U.S. Br. in *Seattle* at 13.[7]

C. JCPS's Objective Amounts To "Outright Racial Balancing," Which This Court Has Repeatedly Admonished Does Not Justify Race-Based Decisionmaking

1. Absent the need to remedy a prior constitutional violation or the specialized kind of diversity objective identified in *Grutter*, a goal of "assur[ing] within [a] student body some specified percentage of a particular group merely because of its race" cannot justify the use of race in making student placement decisions. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Indeed, the Court has repeatedly admonished that "outright racial balancing" is "patently unconstitutional." *Grutter*, 539 U.S. at 330; *Croson*, 488 U.S. at 507; *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). As the Court explained in *Freeman*: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 503 U.S. at 494; see *Missouri* v. *Jenkins*, 515 U.S. 70, 118-123 (1995) (Thomas, J., concurring).

As discussed, JCPS's racial guidelines cannot be justified as an effort to remedy any constitutional violation. See Part II.A, *supra*. Rather, the County's overall student assignment is

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[7] The County's broad categorization of all nonblack students into the single racial category of "other" further undermines its claim of pursuing the type of "highly individualized, holistic review" claimed in *Grutter*. 539 U.S. at 337; cf. *Wygant*, 476 U.S. at 284 n.13 (noting that the "definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan") (citation omitted).

concededly designed to achieve a pre-set racial balance between black and nonblack students in JCPS schools. In effect, the racial guidelines apply to maintain in each school a range intended to approximate—within roughly 15 percentage points—the overall racial balance between black and nonblack students that exists in the public school system as a whole. Pet. App. C18.

That means that the plan requires, *inter alia*, that students such as petitioner's son, who desire to transfer from one elementary school to another, may do so only if the transfer will not cause either the student's current school or the proposed transfer school to fall outside the required racial range. As the district court found, "where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected," and "a student's race, whether Black or White, could determine whether that student receives his or her first, second, third, or fourth choice of school." Pet. App. C18.

As explained above, JCPS does not base its rigid race-based range on a finding that a certain percentage is necessary to achieve particular educational benefits associated with broadly diverse student bodies. Rather than working forward toward a particular pedagogical conception of diversity, JCPS—like the Seattle school district, see U.S. Br. in *Seattle* at 16—simply works backward from the total percentage of black student enrollment systemwide and tolerates only a preset percentage of deviation (which itself is not targeted to any educational goal). Pet. App. C17-C18. This is simple racial balancing, which the Constitution forbids. See p. 13, *supra*; *Grutter*, 539 U.S. at 386 (Kennedy, J., dissenting) (calibrating "admission to members of selected minority groups in proportion to their statistical representation in the applicant pool" is "racial balancing").

2. The district court concluded that JCPS is not seeking a pre-set racial balance "for its own sake," but rather to achieve the educational and social benefits of racially diverse schools.

Pet. App. C53. But a well-intentioned quota is still a quota and an asserted interest in seeking educational and social benefits that are similar to those that flow from a genuinely diverse student body, see *Grutter*, 539 U.S. at 329-330, cannot transform an unconstitutional plan of racial balancing into a constitutional one. The Court in *Grutter* emphasized that individualized consideration was critical, such that "an interest *in simple ethnic diversity*, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," is constitutionally forbidden. *Id.* at 324-325 (quoting *Bakke*, 438 U.S. at 315) (emphasis added). JCPS's plan seeks exactly that. In JCPS, "a specified percentage" (between 15% and 50%) of each school's student body "is in effect guaranteed to be [black students]." *Ibid.* Regardless of JCPS's stated ultimate interest, its assignment plan in fact maintains a pre-set racial balance of black and nonblack students in Jefferson County schools. Race-based decisionmaking to accomplish such a balance is "patently unconstitutional." *Grutter*, 539 U.S. at 330.

The district court also pointed to the County's interest in avoiding racially concentrated schools as a potential compelling interest justifying the County's rigid racial guidelines. That purpose is undoubtedly legitimate and important, and school districts across the country have used a variety of race-neutral methods to address it. See pp. 21-22, *infra*. However, the legitimate purpose of avoiding racial isolation cannot justify the race-based plan at issue here. This Court has never recognized an interest in eliminating *de facto* racial concentration as a compelling interest that justifies racial balancing, and there are good reasons not to do so here.

To be sure, the government has a compelling interest in eliminating or reducing minority group isolation that is the product of *de jure* segregation. See Part II.A, *supra*. But the district court's decision in 2000 dissolving the mandatory desegregation plan makes clear that any racial concentration that may exist in the JCPS is not traceable to the County's prior

regime of *de jure* segregation. See *Hampton*, 102 F. Supp. 2d at 360.

And this Court "has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.14 (1977); see *Freeman*, 503 U.S. at 494. The government has a legitimate interest in seeking to address such concerns through race-neutral means, such as establishing magnet schools, opening school enrollment, and reallocating resources to attract more students to particular schools. The legitimate purpose of reducing minority group isolation, however, is not, in itself, sufficient to warrant resort to the racial classification at issue.

III. JCPS'S RACE-BASED STUDENT ASSIGNMENT PLAN IS NOT NARROWLY TAILORED

Like the plan at issue in the *Seattle* case, JCPS's race-based student assignment plan is also not narrowly tailored because it fails to meet *any* of the "hallmarks" (*Grutter*, 539 U.S. at 334) of a constitutionally permissible race-conscious program.

A. JCPS's Plan Treats Students Solely As Members Of Racial Groups And Denies Them Individualized, Holistic Consideration

As this Court stressed in *Grutter*, individualized consideration is "paramount" in any race-conscious admissions program, 539 U.S. at 337, because "the Fourteenth Amendment protects *persons*, not *groups*," *id.* at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and brackets omitted). Thus, "[t]o be constitutional, a university's interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process." *Id.* at 392 (Kennedy, J., dissenting). Indeed, individualized consideration is the critical factor that differentiates the diversity interest identified in *Grutter* from the kind of racial balancing condemned in *Grutter* and a host of this Court's decisions. Far from minimizing the use of race in its assignment plan and maximizing the concept of

individualized consideration, the County labels applicants based on race alone, and makes assignment decisions based on those labels.

Wholly unlike the admissions plan upheld in *Grutter*, JCPS's plan considers a student's race in an "[in]flexible, []mechanical way" to achieve a pre-set racial balance of students in each of its schools. *Grutter*, 539 U.S. at 334. By doing so, it fails to treat individual students *as* individuals, which is a fatal flaw under the Court's cases. See *Bakke*, 438 U.S. at 318. When a school employs a student assignment plan that considers only whether a student's race will help or hinder a school's effort to achieve a pre-set racial balance, it defies the Constitution's "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

Although the district court described JCPS's target racial balance as "flexible," Pet. App. C69, the consideration of a student's *race* in administering the plan is not. The plan results in the "automatic acceptance or rejection" of some students' assignment choices based solely on their race. *Grutter*, 539 U.S. at 337. For example, if a student's race would "imbalance" either his assigned school or his school of choice, his transfer request will be denied under the racial guidelines. See Pet. App. C7 n.3 (explaining that petitioner's son was denied a transfer to his school of choice because it "would have had an adverse effect" on his current school's racial composition and would have violated the racial guidelines); see also *id.* at C18 (explaining that "where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student * * * could be affected"); *ibid.* (explaining that "a student's race, whether Black or [non Black], could determine whether that student receives his or her first, second, third or fourth choice of school"). By treating race as "the defining feature" of a student's assignment request, JCPS's plan contradicts a central objective of the

Equal Protection Clause. *Grutter*, 539 U.S. at 337; see *Bakke*, 438 U.S. at 318 (opinion of Powell, J.).

The district court mistakenly characterized the County's plan as providing individualized review because, in addition to race, the plan also considers "the individual characteristics of a student's application, such as place of residence and student choice of school or program." Pet. App. C62-C63. But a student's place of residence itself determines which schools are available choices, and the student's choice of schools is used to determine whether his choice would "imbalance" the chosen school. Even the administration of a quota at a school would require consideration of whether the student chose to apply to the school or program subject to the quota. Clearly, such a myopic consideration of "individual" attributes is far from the type of "*highly* individualized, holistic review" required by *Grutter*, and is manifestly not designed to select a genuinely diverse student body whereby "*all* factors that may contribute to student body diversity are meaningfully considered alongside race." 539 U.S. at 337 (emphases added).

Similarly unavailing is the district court's attempt to rely on contextual differences between public high schools and selective graduate programs. Pet. App. C62. According to the court, "[u]nlike the law school, JCPS does not deny anyone the benefits of an education"; "does not have the goal of creating elite and highly selective school communities"; and does not "weigh[] comparative criteria in a competitive manner." *Ibid.* Instead, JCPS's "goal is to create more equal school communities for educating all students." *Ibid.* But none of those differences, assuming they exist, justifies disregarding or diluting the "paramount" narrow-tailoring factor of holistic, individualized consideration.

First, while it is true that student assignments in the elementary and secondary school context are typically not subject to the type of selective consideration common in the university admissions process, that does not mean that individualized consideration is inherently infeasible in the elementary and

secondary school admissions context. To the contrary, magnet school programs, which are typically designed to attract minority students, often include individualized-type consideration including personal essays, background information, and student interviews as part of the admissions process. And it appears that some of the magnet schools in JCPS—not at issue here—actually employ a more individualized admissions process, which includes review of personal essays. See p. 12 n.6, *supra*.

More fundamentally, regardless of the relative feasibility of individualized consideration in this context, adopting the district court's reasoning that individualized consideration is less relevant here and therefore optional wholly undermines the narrow-tailoring analysis and would mean that individualized consideration is no longer "paramount" in a race-conscious admissions program. 539 U.S. at 337. The fact that a plan, such as JCPS's, fails to provide meaningful individualized consideration has to mean that the plan *fails* to satisfy the first prong of the narrow-tailoring analysis, not that the first prong drops out of the analysis or becomes less relevant. See U.S. Br. in *Seattle* at 20-21.

To the extent that the district court was suggesting that the requirements of *Grutter* are inapplicable on the theory that educational opportunities within JCPS are fungible, that argument also should be rejected. The idea that *de jure* racial discrimination is permissible as long as the educational opportunities are equal or fungible was decisively rejected in *Brown*. Moreover, as a practical matter, the facts that some schools are more popular than others, and that students want to transfer from their assigned school to a different one, demonstrate that parents and students, who are in the best position to judge, do not view the schools as fungible. See 05-908 Pet. App. 105a ("It is common sense that some public schools are better than others.").

B. JCPS's Plan Operates As A Quota

The County's plan is indistinguishable from a quota because it imposes "a fixed * * * percentage which must be attained, or which cannot be exceeded," in its schools. *Grutter*, 539 U.S. at 335 (quoting *Local 28 of the Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 495 (1986)). Like the plan at issue in the *Seattle* case, JCPS's plan is designed to approximate, within a rigid, numerical band, the balance between black and nonblack students that exists in the district as a whole. See U.S. Br. in *Seattle* at 21-22.

JCPS's plan "*requires* each school to seek a Black student enrollment of at least 15% and no more than 50%," and provides school administrators with the authority "*to maintain* schools within the 15-50% range." Pet. App. C17-C18 (emphasis added). In practice, if granting a student's assignment request would "imbalance" either the student's resides school or his preferred school, JCPS will deny the student's request under the guidelines. *Id.* at C24-C25. It is clear that this program is driven by the numbers. Accordingly, the plan's purpose and the County's conduct demonstrate that JCPS is adhering to a rigid, mechanical process to achieve a "fixed * * * percentage" of white and nonwhite students in its schools. *Grutter*, 539 U.S. at 335; see *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (approving of the Harvard Plan in part because it "has no[] set target-quotas").

That the plan determines black and nonblack student enrollment in accordance with a fixed numeric range, rather than a single fixed number, makes no difference. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 332 n.12 (1974) (Douglas, J., dissenting) (concluding that it is "irrelevant to the legal analysis" whether the admissions committee has "chosen only a range" or "set a precise number in advance" for minority admissions); *Fishermen's Dock Coop., Inc.* v. *Brown*, 75 F.3d 164, 169 (4th Cir. 1996) (defining quota as a range). Indeed, the "range" here can be understood as simply setting two quotas—both a minimum and a maximum number of black students at each school. As a

constitutional matter, those quotas are just as infirm as picking a single number of desired students from a particular race.

The County's goal of enrolling a pre-set balance of students differs substantially from the Michigan law school's goal of enrolling a "critical mass" of underrepresented minority students. See *Grutter*, 539 U.S. at 335-336. In *Grutter*, this Court approved of the law school's efforts to enroll an *undefined*, "meaningful number[]" of minority students to achieve the educational benefits of a *genuinely diverse student body*. *Id.* at 318. Here, JCPS seeks to enroll a *defined* number of "black" and "other" students in its schools, and that number derives its "meaning[]" solely from the County's demographics. Pet. App. C18 (explaining that the racial guideline "reflects a broad range equally above and below Black student enrollment systemwide"). The County is thus seeking to "assure within [each school's] student body [a] specified percentage of a particular group merely because of its race." *Grutter*, 539 U.S. at 329-330.

JCPS's plan also operates as a quota because it "insulates a category of applicants with certain desired qualifications from competition with other applicants." *Grutter*, 539 U.S. at 334. Specifically, the plan renders some applicants ineligible for consideration for assignment at certain schools (or any school if the student's race ameliorates the imbalance at the assigned school) simply because of their race. A JCPS student requesting an assignment to or from a school that "hovers at the extreme ends of the racial guidelines," Pet. App. C24, will *not* be considered alongside an applicant of a different race if the requested transfer would contribute to a racial imbalance at either school.

C. JCPS Failed To Pursue Race-Neutral Means of Achieving Racially Integrated Schools

The County's plan is also not narrowly tailored because its goal of achieving racially integrated schools can be achieved effectively through race-neutral alternatives. For example, race-neutral decisions about resource allocation, personnel, and curriculum can—and do—have a substantial impact on the racial composition of schools, particularly where, as here, the school district incorporates student choice into its assignment plan. See U.S. Br. in *Seattle* at 23-27; see also *Swann*, 402 U.S. at 20 (discussing how the "construction of new schools and the closing of old ones" may have "far reaching" consequences with respect to the racial balance of schools). School districts have a legitimate interest in seeking to employ such race-neutral measures to reduce racial isolation and achieve other legitimate educational objectives, and such race-neutral efforts have been adopted across the country. See, *e.g.*, Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* 63, 66-71 (2004).[8]

Moreover, school districts have a strong interest in providing a high quality education to all students, and should continue to seek innovative solutions to improve educational opportunities for all children, including race-neutral choice and open enrollment programs. The County here, however, failed adequately to consider race-neutral alternatives.

D. The County's Plan Unfairly Burdens Innocent Third Parties

While JCPS's plan does not deny any student the opportunity to attend *a* public school, it does deny those students whose race would negatively affect a school's racial balance the opportunity

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[8] Of the potential race-neutral alternatives available to school districts, Congress has determined that the use of magnet schools is a particularly effective means of addressing minority group isolation and has funded magnet school programs. See U.S. Br. in *Seattle* at 25-26.

to attend the school of their choice, including the ability to attend the most sought-after schools and programs in the school district solely because of their race. Having acknowledged the benefits of educational choice, the County has denied some students their school of choice solely on the basis of race. *Grutter* emphasized that the Constitution protects a student from being "foreclosed from all consideration * * * simply because he was not the right color or had the wrong surname." 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318 (opinion of Powell, J.)). The County's plan forecloses certain students "from all consideration" at imbalanced schools if they are "not the right color" for the predefined, acceptable racial balance at that school. *Ibid.* Indeed, if a student's presence at the assigned school ameliorates its racial imbalance, that student is effectively trapped there and denied the ability to transfer to any other school that would otherwise be an available choice. As this Court has explained, "[t]he exclusion of even one [person] * * * for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system." *J.E.B.* v. *Alabama*, 511 U.S. 127, 142 n.13 (1994). Thus, if denying (or granting) a student's assignment request based *solely* on his race is the price of achieving racially "balanced" schools, then "the price is too high to meet the standard of the Constitution." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); see *Wygant*, 476 U.S. at 280-281 (plurality opinion); *Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting).

E. The County's Plan Is Not Limited In Time

Race-based policies in an educational setting "must be limited in time" and "have a logical end point." *Grutter*, 539 U.S. at 342. Thus, admission plans in furtherance of a compelling interest may consider race as a factor so long as they incorporate "sunset provisions" and "periodic reviews" to determine the continued need of the race-based programs. *Ibid.* The JCPS plan does not contain any such mechanism. Moreover, because the County has chosen to justify its plan based in part on the goal of maintaining

integrated schools within a district that is *not* racially integrated as a residential matter, the County's plan has no logical, much less fixed, end point.

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The promise of *Brown* and its progeny was "to effectuate a transition to a racially nondiscriminatory school system," and thus "achieve a system of determining admission to the public schools on a nonracial basis." *Brown II*, 349 U.S. at 300-301. The United States remains deeply committed to that objective. But once the effects of past *de jure* segregation have been remedied, the path forward does not involve new instances of *de jure* discrimination. A federal court found in 2000 that all vestiges of past discrimination had been eliminated in JCPS. JCPS's voluntary race-based school assignment plan—adopted after that court finding—does not advance the objective of "a racially nondiscriminatory school system," *id.* at 301, and the "unhappy consequence [of such a race-based measure] will be to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). "Th[at] perpetuation, of course, would be the worst of all outcomes." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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